Supreme Court, U.S.
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No. 01-271

IN THE

Supreme Court of the United States

NORTHWEST VILLAGE LIMITED PARTNERSHIP,
GRANDVIEW HILLS LIMITED PARTNERSHIP,
PARKRIDGE APARTMENTS LIMITED PARTNERSHIP,
LAMPLITE LIMITED PARTNERSHIP, and
WEST POINTE LIMITED PARTNERSHIP,
Petitioners,

v.

WILLIAM E. FRANKE,
THE GANNON MANAGEMENT COMPANY OF MISSOURI and
PRAIRIE PROPERTIES, L.L.C.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS FRANKE AND GANNON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

Respondents The Gannon Management Company of Missouri ("Gannon") and William E. Franke ("Franke") (collectively, "Gannon/Franke") note that Petitioners misstate Gannon's correct legal name by omitting "The".

STATEMENT PURSUANT TO RULE 29.6

Gannon is a privately held corporation, with no parent corporation. No publicly held company owns 10% or more of Gannon's stock.

JURISDICTION

Gannon/Franke respectfully submit that this Court does not have jurisdiction over this matter, as the case is moot. Since the matter is moot, the constitutional jurisdictional requirement of "cases" or "controversies" has ceased to exist, mandating dismissal. *See* Section C below.

STATUTE INVOLVED

Gannon/Franke submit that the only statute at issue in this case is 11 U.S.C. § 1129 (plan confirmation requirements). Gannon/Franke dispute that any provision of the U.S. Constitution is properly implicated by the Petition.

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STATEMENT OF THE CASE

For their statement of the case, Gannon/Franke adopt and incorporate herein by reference the descriptions set forth in the decisions of the court of appeals and the district court below. *In re Westpointe, L.P.*, 241 F.3d 1005, 1007 (8th Cir. 2001); *In re Westpointe, L.P.*, 234 B.R. 431, 433-37 (E.D. Mo. 1999).

Further, in accordance with Rule 15.2, Gannon/Franke advise the Court of the following misstatements of fact and law contained in Petitioners' Petition for Writ of Certiorari ("Pet."):

1. Petitioners allege that "[t]he present value of [certain] cash flows and accumulation of equity was valued by the [Petitioners] at $7,711,402." Pet. p. 12 . Petitioners fail to advise the Court, however, that the bankruptcy court refused to certify as an expert Petitioners' proferred expert witness (Bryson Randolph) regarding this valuation issue, and refused to accept into evidence Randolph's report setting forth this valuation. The bankruptcy court's evidentiary rulings were upheld by the lower appellate courts, and are not at issue here. As there is no competent record evidence on this cash flow valuation issue, Petitioners' reference thereto and reliance thereon is improper.

2. Petitioners now challenge the Tellatin Appraisal, heavily relied upon by the bankruptcy court in its insolvency analysis. Pet. pp. 13, 16-22. Petitioners fail to advise the Court, however, that at the September, 1996 bankruptcy court insolvency hearing (the "Valuation Hearing"), Petitioners stipulated to the following: (i) Mr. Tellatin's qualifications as an expert in the fields of commercial real estate appraisal and valuation; and (ii) Mr. Tellatin's opinion of value of $38.6 million. Further, Petitioners did not object to the admission into evidence of Mr. Tellatin's appraisal report setting forth that $38.6 million value. .

3. Petitioners state that "there is an **undisputed**, substantial post-petition net income stream derived from the reorganized estate which . . . GP 19 gets to keep." Pet. p. 16 (emphasis added). In fact, there is no competent record evidence of any post-confirmation net income stream.

4. Petitoners state that "[t]he bankruptcy court . . . refused to consider the post-confirmation prospective net

cash flows to GP 19." Pet. p. 16. In fact, the bankruptcy court expressly considered these cash flows, finding that the cash flows (and other components) "were in fact included in the [Tellatin] [A]ppraisal of the overall value of the Properties . . ." Pet. Appendix ("Pet. App.") D 37a.

Further, in accordance with Rule 14.1(g)(ii), Gannon/ Franke advise the Court that federal jurisdiction in the bankruptcy court was proper pursuant to 28 U.S.C. §§ 157 and 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri.

REASONS FOR DENYING THE PETITION

A. The Decision Of The Court Of Appeals Does Not Conflict With Decisions Of Other Courts Of Appeals Regarding Section 1129 Requirements.

1. Petitioners Misread or Misstate the Decision of the Court of Appeals Below.

The court of appeals properly rejected Petitioners' HUD claim bifurcation argument. In so ruling, the court stated that "[w]e reject Debtors' argument that HUD's failure to make an election under § 1111 (b) precludes treating the unsecured portion of HUD's claim the same as the secured portion of the claim, because the Franke/Gannon Plan clearly treated the two claims as part of the same class of interests and the Debtors failed to raise a proper and timely objection." Pet. App. A 6a-7a.

Petitioners, however, misread or misstate this aspect of the court's ruling. In a transparent attempt to create a conflict, Petitioners advise this Court that "the Eighth Circuit ruled in this case that the bankruptcy court could properly confirm the Plan **even if it did not comply with § 506(a) in its treatment of the HUD claim**, because the Debtors had failed to specifically object to the Plan's failure to separately classify the secured and unsecured portions of the HUD

Claim." Pet. p. 26 (emphasis added). Contrary to Petitioners' assertion, the court of appeals did not rule or imply that the Plan does not comply with section 506(a). The court of appeals did not hold that Petitioners' failure to raise a timely objection eliminated the duty of the bankruptcy court to independently determine that the Plan complies with section 1129. The court of appeals did not hold that the bankruptcy court abrogated its duty to independently determine that the Plan complies with section 1129. The court of appeals did not hold that the requirements of section 1129 are waivable. The court of appeals did not hold that the Plan fails to comply with section 1129. The ruling of the court of appeals below, accordingly, does not conflict with decisions of other courts of appeals regarding section 1129 requirements.

2. The Bankruptcy Court Expressly Found that the Plan Complies With the Applicable Provisions of Chapter 11.

In the June 22, 1992 order confirming the Plan (the "Confirmation Order"), the bankruptcy court expressly found that "[t]he Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code . . ." Respondents' Appendix ("Resp. App.") B 24a. The bankruptcy court clearly did not abrogate its statutory duty under section 1129(a)(1). Accordingly, the decision of the court below does not turn on the waivability of section 1129 requirements.

Given the foregoing, this Court's review of the decision below clearly seems unwarranted. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (writ of certiorari should not be granted except in cases of significant public importance and "where there is a **real and embarrassing conflict of opinion and authority** between the Circuit Court of Appeals") (emphasis added). Indeed, review of the decision below would not provide this Court with any meaningful opportunity to advance the development of bankruptcy jurisprudence.

B. This Case Does Not Impact Persons Other Than Parties, And Does Not Implicate Any Issue Of Significant Public Importance.

1. This Case Represents a Fact Specific Valuation Determination.

When a plan extinguishes equity interests, a principal "fair and equitable" consideration under section 1129(b)(1) is whether the debtor is insolvent. *King Resources Stockholders' Protective Comm. v. Baer (In re King Resources Co.)*, 651 F.2d 1326, 1335 (10th Cir. 1980). A debtor is insolvent if its liabilities exceed its assets. 11 U.S.C. § 101(32)(B). The issue of insolvency is a factual determination, subject to the "clearly erroneous" standard of review. *Muncrief v. Mt. Prospect State Bank (In re Muncrief)*, 900 F.2d 1220, 1223-24 (8th Cir. 1990); *In re King Resources*, 651 F.2d at 1335.

Here, the Plan extinguishes the Class 11 partnership interests in Petitioners. Resp. App. A 16a. Accordingly, to determine whether the Plan is "fair and equitable" with respect to these extinguished interests, the bankruptcy court needed to determine whether Petitioners are insolvent.

To determine solvency, the bankruptcy court conducted a four day, full evidentiary hearing. 11 witnesses provided live testimony. The parties proferred over 150 joint factual stipulations. The parties submitted hundreds of exhibits and voluminous deposition transcripts. After carefully considering all competent evidence, the bankruptcy court ruled that Petitioners are insolvent by over $19 million.[1] The appellate courts below affirmed, in all respects, these factual determinations.

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[1] The bankruptcy court determined the value of Petitioners' assets at $56,394,669.77, and Petitioners' liabilities at $75,829,331.24. Pet. App. D 67a.

Petitioners, in essence, now request that this Court overrule the detailed factual findings of the bankruptcy court. Even if the factual findings were clearly erroneous, which they are not, such a ruling by this Court would only impact Petitioners, Respondents and other parties in interest in the bankruptcy case. Such a ruling would not impact persons other than parties. Such a ruling would not implicate any issue of significant public importance. Gannon/Franke respectfully suggest that this garden variety factual dispute is not worthy of this Court's attention and resources.

2. The HUD Loan Program Purportedly at Issue Was Repealed.

Section 223(f) of the National Housing Act, 12 U.S.C. §§ 1701 *et seq.* (repealed 1990), authorized the HUD insured loans purportedly at issue here.[2] This statute, however, was repealed in 1990. Accordingly, any decision by this Court with respect to the provisions of section 223(f) will have no practical impact outside the bounds of this case.

3. This Case Does Not Implicate the "New Value" Exception.

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) addresses the "new value" exception to the "absolute priority" rule. Under this doctrine, if an estate is to be reorganized by a debtor, and all senior creditors are not paid in full, the debtor must contribute "new value" for the privilege of retaining ownership. Failure to contribute "new value" violates the "absolute priority" rule.

Here, the Plan provides that GP 19 receives the transfer of estate property. Resp. App. A 16a. Since Petitioners (formerly debtors) are not retaining ownership, *Ahlers* is wholly inapposite. Petitioners' reliance thereon is misplaced.

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[2] Petitioners place considerable reliance on the purportedly favorable financing terms available under section 223(f). Pet. pp. 13, 16-22.

C. The Case Is Moot.

The U.S. Constitution confines federal court jurisdiction to those matters which embody actual "cases" or "controversies". U.S. Const. art. III, § 2, cl. 1; *Honig v. Doe*, 484 U.S. 305, 317 (1988). This requirement must be satisfied at each and every stage of the litigation. *Spencer v. Kemna*, 523 U.S. 1, 7 (1988). When a matter becomes moot, a case or controversy ceases to exist, and dismissal of the action is compulsory. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-96 (1980).

A reviewing court should dismiss as moot a case when no effective, meaningful relief may be granted. *In re Information Dialogues*, 662 F.2d 475, 476-77 (8th Cir. 1981); *see also In re Continental Airlines*, 91 F.3d 553, 558-59 (3rd Cir. 1996). A court should consider a case moot and unreviewable when implementation of a plan of reorganization has created, extinguished, or modified rights, especially rights of parties not before the reviewing court, to such an extent that effective judicial relief is no longer available. *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir. 1992).

This doctrine of equitable mootness focuses on whether it is prudent to upset a plan of reorganization at a late date. *Continental Airlines*, 91 F.3d at 559. The doctrine reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment, and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting it. *Manges v. Seattle-First Nat'l Bank* (*In re Manges*), 29 F.3d 1034, 1039 (5th Cir. 1994) (*citing First Union Real Estate Equity and Mtg. Inv. v. Club Assoc. (In re Club Assoc.)*, 956 F.2d 1065, 1069 (11th Cir. 1992)).

Factors courts consider in determining whether a case is moot include: 1) whether the confirmed reorganization plan has been substantially completed; 2) whether a stay has been

obtained; 3) whether the relief requested would affect the rights of parties not before the court; 4) whether the relief requested would affect the success of the plan; and 5) the public policy of affording finality to bankruptcy judgments. *Continental Airlines*, 91 F.3d at 560; *see also Manges*, 29 F.3d at 1039; *Andreuccetti*, 975 F.2d at 418.

The fact that no stay pending appeal was granted is particularly important in conjunction with equitable mootness. Further, it is not important whether the lack of a stay resulted from the failure to apply for a stay, or whether the lower court denied such application. "A stay not sought, and a stay sought and denied, lead equally to the practical implementation of a plan of reorganization." *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994). Absent a stay, third parties are encouraged to rely on the confirmation order and implementation of the plan of reorganization. *Id.*

Here, the bankruptcy court confirmed the Plan over nine years ago. There has been no stay pending appeal.[3] As a result, all of the estates have been equitably transferred to GP 19.[4] In reliance on the confirmed Plan, GP 19 has paid the claims of all allowed secured and unsecured claims, has made payments on HUD's Class 5 secured claim of over $51 million,[5] has incurred substantial expenses of over $5.5 million in the repair, rehabilitation, and maintenance of the projects, and has managed the day to day operations of the projects (Petitioners' former businesses) for over nine years.

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[3] Petitioners requested a stay at the bankruptcy court level, which was denied. Thereafter, Petitioners requested a stay at the district court level, which also was denied.

[4] In reliance on Plan definitions, prior appeals and this *certiorari* proceeding, Petitioners have not yet formally executed deeds transferring record title to the apartment projects to GP 19.

[5] HUD's Class 5 secured claim is now held by Respondent Prairie Properties, LLC ("Prairie").

Regarding the effect of the relief requested on parties not before this Court, reversal of the Plan at this late date would require massive disgorgement of funds paid years ago to numerous creditors, in some cases to entities which may not continue to exist. Payments on utility claims, tax claims, construction and repair expenses, just to name a few, would all have to be unwound. None of these parties is currently before this Court, yet each would be affected by the Court's action.

As to whether the relief requested would affect the success of the Plan, it is clear that reversal would destroy the nine year successful implementation of the Plan. As of this date, GP 19 represents a Chapter 11 bankruptcy success story. To reverse the Confirmation Order, and undo implementation of the Plan and nine years of successful business management, would be inequitable. *See Continental Airlines*, 91 F.3d at 553 (dismissing as moot an appeal argued three years following entry of the unstayed confirmation order); *Manges*, 29 F.3d at 1034 (dismissing as moot an appeal argued three years following entry of the unstayed confirmation order); *UNR Indus.*, 20 F.3d at 766 (dismissing as moot an appeal argued three years following entry of the unstayed confirmation order); *In re Roller*, 999 F.2d 346 (8th Cir. 1993) (dismissing as moot an appeal in a Chapter 12 case argued approximately one year following conversion to Chapter 7 and subsequent liquidation sales by trustee); *Information Dialogues*, 662 F.2d at 475 (dismissing as moot an appeal argued only eight months following entry of the unstayed confirmation order).

Finally, consideration of the public policy of affording finality to bankruptcy court judgments also strongly mitigates in favor of denying the Petition. Allowing review in a case such as this would likely undermine public confidence in the finality of bankruptcy confirmation orders and make successful completion of large reorganizations like this more difficult. *Continental Airlines*, 91 F.3d at 565.

In summary, effective relief can not be fashioned by this Court. Alternatively, even if this Court could fashion relief, implementation of that relief would be inequitable. This Court should deny the Petition on mootness grounds.[6]

D. Petitioners Lack Standing.

To enjoy standing to request review of an order of a bankruptcy court, a party must demonstrate that it is an aggrieved person, a party directly and adversely affected pecuniarily by the order. *In re Andreuccetti*, 975 F.2d 413, 416 (7th Cir. 1992); *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987); *In re Kieffer-Mickes, Inc.*, 226 B.R. 204, 208 (8th Cir. BAP 1998).

An insolvent debtor, therefore, does not have standing to contest an order of the bankruptcy court, because the debtor does not have a pecuniary interest in the distribution of assets of the estate. *Andreuccetti*, 975 F.2d at 417; *San Juan Hotel*, 809 F.2d at 154-55; *Kieffer-Mickes*, 226 B.R. at 208. The only exceptions to this rule are: 1) if a successful appeal by the debtor would create an estate that has assets in excess of liabilities; or 2) the appeal is from an order which affects the debtor's discharge. *Andreuccetti*, 975 F.2d at 417; *San Juan Hotel*, 809 F.2d at 156 n.6; *Kieffer-Mickes*, 226 B.R. at 209.

According to the valuation of the bankruptcy court, Petitioners' liabilities exceed assets by approximately $19 million. As a hopelessly insolvent debtor, Petitioners do not have standing to seek this Court's review of the decision below. Petitioners cannot contest the treatment of creditors contained in the confirmed Plan because no remedy available in this Court will affect the hopelessly insolvent Petitioners' rights.

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[6] Gannon/Franke moved to dismiss on mootness and lack of standing grounds before the court of appeals below. Since the court affirmed in Gannon/Franke's favor on the merits in all respects, it denied the dismissal motion as moot. 241 F.3d at 1009.

In addition, neither exception to this rule of standing applies here. The Petition cannot result in the creation of estates with assets in excess of liabilities. *See* section E below. Further, the Petition does not concern the discharge of Petitioners. This Court should deny the Petition on standing grounds.

E. The Decision Of The Court Of Appeals Is Correct.

1. No Evidence Shows Petitioners Are Solvent.

A fundamental flaw in Petitioners' arguments is that absolutely no competent record evidence shows Petitioners are solvent. Petitioners fail to cite any erroneous factual finding which, if corrected, would render Petitioners solvent.[7]

2. Petitioners' Valuation Methodology Argument Is Irrelevant.

It is undisputed that the liens of the Class 5 secured creditor (HUD, now Prairie) encumber all of the estate assets. *In re Westpointe, L.P.*, 241 F.3d 1005, 1008-09 (8th Cir. 2001).[8] Accordingly, Petitioners' valuation methodology argument is irrelevant. Regardless of the methodology used, whatever

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[7] Petitioners allege that the courts below failed to properly consider certain post-confirmation cash flows and equity accumulations, totalling $7,711,402. Pet. p.12. First, as set forth above, this "evidence" was properly excluded by the bankruptcy court, and these evidentiary rulings, upheld by the lower appellate courts, are not at issue before this Court. Accordingly, Petitioners' reliance on this purported "value" is improper. Regardless, Petitioners are insolvent by over $19 million. Even if Petitioners are correct regarding these post-confirmation cash flows and equity accumulations, which they are not, Petitioners still are insolvent by over $11 million.

[8] Petitioners contested the validity and extent of the Class 5 liens in the courts below. The court of appeals, agreeing with the bankruptcy court and district court below, found that the liens encumber all of Petitioners' assets. 241 F.3d at 1008-09. Petitioners do not challenge that finding in this Court.

increase in asset value arguably resulting therefrom is offset in the insolvency analysis (dollar for dollar) on the liability side by the HUD claim.[9]

F. Petitioners Have Stated An Intention To Attempt To Convert The Bankruptcy Case To Chapter 7 (Liquidation).

Petitioners have advised Gannon/Franke that they intend to attempt to convert the case to Chapter 7.[10] Gannon/Franke are confident that such a conversion attempt at this late date (nine years after confirmation of the Plan) is impermissible, would not succeed, and would not impact implementation of the Plan. Gannon/Franke fully intend to oppose any such attempt. Nonetheless, Gannon/Franke feel Rule 15 requires disclosure of this matter to this Court.

CONCLUSION

For all the foregoing reasons, Respondents William E. Franke and The Gannon Management Company of Missouri respectfully submit that the Petition for Writ of Certiorari should be denied.

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[9] Up to $64,897,724, the face amount of the total allowed HUD claim. *See* Pet. App. D 67a. Nothing in the record (or elsewhere) even remotely supports the proposition that the value of Petitioners' assets exceeds $64 million.

[10] *See* Resp. App. C-F 33a-42a. "I must report that there is a strong feeling that Chapter 7 is the way to proceed..." Letter from Kevin W. Kelly to Robert P. Greene (Sept. 7, 2001). Resp. App. F 41a. Mr. Kelly is the general partner of Petitioners, and Mr. Greene is the Executive Vice President of Gannon.

Respectfully submitted,

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